distance between work sites is clearly expressed throughout the legislative history of the Family and Medical Leave Act. In Public Law 103-3, Senate Report No. 103-3, dated January 27, 1993, the following can be found:

Under "Summary of the Bill," it states:

> Title I of S. 5, the Family and Medical Leave Act of 1993, makes available to eligible employees up to 12 weeks of unpaid leave per year under particular circumstances that are critical to the life of a family. . .
>
> The act exempts small businesses and limits coverage of private employers to employers who employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year. To be eligible for leave, an employee of a covered employer must have been employed by the employer for at least 12 months and must have worked at least 1,250 hours during the 12-month period proceeding the commencement of the leave. The employer must, in addition, employ at least 50 people within a 75-mile **radius** of the employee's work site. P.L. 103-3, page 4; S. REP. No. 103-3, pages 1-2. (emphasis added)

Under "Definitions," it states:

> The term "eligible employee" is further defined in section 101(2)(B) to exclude any employee employed at a worksite with less than 50 employees if the total number of employees employed by the employer within 75 miles of

> the worksite is less than 50. In aggregating the number of employees at the worksite and within the 75 mile **radius**, all employees of the employer, not just eligible employees, are to be counted. P.L. 103-3, page 25; S. REP. No. 103-3, page 23. (emphasis added)

Under "Regulatory Impact Statement," it states:

> S. 5 would regulate every private and public sector employer with 50 or more employees within a 75-mile **radius**. This number is estimated as approximately 293,000 establishments. Employees who have worked at least one year and 1250 hours for that employer would be eligible for leave under the Act. This number is estimated as approximately 44 million employees. Those not regulated would be all employers with fewer than 50 employees. P.L. 103-3, page 44; S. REP. No. 103-3, page 42. (emphasis added)

Under "Section-By-Section Analysis," it states:

> Section 101. Definitions
>
> . . . .
>
> Eligible employee-means any employee as defined in section 3(e) of the FLSA who is employed by the employer with respect to whom benefits are sought for not less than 12 months and not less than 1250 hours over the previous 12 month period, except that such term does not include Federal officers or employees covered under Title II of the Act.

> Employer-means any person engaged in commerce who employs 50 or more employees within a 75-mile **radius** during 20 or more calendar weeks in the current or preceding calendar year; any successor in interest of an employer; and any public agency defined under section 3(x) of the FLSA. P.L. 103-3, page 45; S. REP. No. 103-3, page 43. (emphasis added)

Every piece of legislative history drafted on the FMLA has included "radius" as the measure of distance between work sites. See Senate Report No. 103-3, January 27, 1993, pages 1-2, 23, 42, 43; Senate Report No. 102-68, May 30, 1991, pages 58, 59-60; House Report No. 103-8(I), February 2, 1993, page 35; House Report No. 102-135(I), June 27, 1991, page 37; House Report No. 101-28(I), Apr. 13, 1989, page 24. In fact, the 1993 and final Senate Report includes the term "radius" as the unit of measure more than any other report. The cost projections, estimates, and impact statements done by the General Accounting Office and the Congressional Budget Office have used "radius" as the measure of distance between work sites. Congressional intent is clear and unambiguous, and the District Court and the Fifth Circuit should have struck down 29 C.F.R. §825.111(b).[1]

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[1]The Fifth Circuit fails to acknowledge the legislative history cited by Mr. Bellum and squarely on point, yet cites indirect legislative history which is clearly contrary to Congress' intent to use "radius" as the measure of distance. (See App. 7 citing the 1991 FMLA House Report)

2. The Fifth Circuit's Opinion Allows an Impermissible and Unauthorized Regulation to Stand

Secondly, under the second prong of the *Chevron*, the regulation cannot stand if it is not a permissible construction of the statute. As addressed above, Congressional intent could not be any clearer. The measure of distance between work sites is "radius." The regulation is not a permissible construction of the statute as it is manifestly contrary to the statutory framework of the act.

Also, as reiterated by the United States Supreme Court in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002), the Secretary of Labor was granted limited authority to prescribe regulations concerning the FMLA. The authority granted to the Secretary of Labor did not include the right to alter the coverage of the leave entitlement provided by Congress. In *Ragsdale*, at 96, this Court held that no further analysis was needed because the FMLA regulation [in that case §825.700(a)]:

> effects an impermissible alteration of the statutory framework and cannot be within the Secretary's power to issue regulations "necessary to carry out" the Act under § 2654. In so holding we do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute. Whatever the bounds of the Secretary's discretion on this matter, they were exceeded here.

Pursuant to 29 U.S.C.S. § 2654, the Secretary of Labor was only granted authority to "prescribe such regulations as are necessary to carry out" the Act. In the case at hand, the

Secretary of Labor has again exceeded the authority granted to it by Congress by reducing the coverage of the FMLA. The regulation should be struck down just as this Court struck down the FMLA regulation in *Ragsdale*.

3. The Reasoning for the Fifth Circuit Opinion is Flawed and Fails to Apply Existing Law

The "geographic limitation of a 75-mile radius that applies to the aggregation of employees at different facilities" as it was called in the 1989 and 1991 House Reports (at pages 24 and 37 respectively) was the result of years of negotiating by Congress. As similarly addressed in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 93-94 (2002), agencies must respect the compromises made by Congress:

> Like any key term in an important piece of legislation, the 12-week [FMLA leave] figure was the result of compromise between groups with marked but divergent interests in the contested provision. Employers wanted fewer weeks; employees wanted more. See H. R. Rep. No. 102-135, pt. 1, p. 37 (1991). Congress resolved the conflict by choosing a middle ground, a period considered long enough to serve "the needs of families" but not so long that it would upset "the legitimate interests of employers." § 2601(b).
>
> Courts and agencies must respect and give effect to these sorts of compromises. (citing *Mohasco Corp. v. Silver*, 447 U.S. 807, 818-819, 65 L. Ed. 2d 532, 100 S. Ct. 2486 (1980).

Members of Congress also battled and negotiated over the number of employees required to meet the small employer exception which was increased to 50 and the number of hours an employee had to work in the preceding 12 month period in order to be eligible for the entitlement which was increased to 1,250. House Report No. 103-8(I), February 2, 1993, pages 20-21. The geographic limitation for the aggregation of employees is a significant designation, and Congress clearly chose "radius" as the method to measure distance within 75 miles. This decision must be respected and applied.

In the Fifth Circuit's opinion on App. 6, the Court suggests a hypothetical which is flawed and focuses on potential inconvenience for a hypothetical company. First, no rational company would build a work site 25 miles away which could be reached only by traveling 120 miles without knowing that inconvenience would follow for all business purposes including labor. Second, there is no requirement that any employee travel between work sites to replace a worker on leave. As in most cases, work is reallocated among local employees and/or a temporary worker is hired to fill in the gaps. Likewise, in the case at hand, no employee traveled between work sites when Mr. Bellum took leave. Despite being entitled to return to his position of employment or a similar position, Mr. Bellum was replaced by a former employee.

Furthermore, the regulation lacks uniformity and simplicity and further, is arbitrary to the extent that it allows the use of "radius" only if no surface method is available instead of exempting such an employer. It is quite a undertaking to travel every country road and highway in a 75 mile radius looking for a road trail of 75 miles or less. In fact, the Fifth Circuit acknowledges that in an earlier unrelated opinion that the Fifth Circuit "specifically rejected the use of road miles because that standard lacks uniformity and simplicity." *See* App. 10, n. 7

(citing *Sprow v. Hartford Ins. Co.*, 594 F.2d 412 (5th Cir. 1979)). In *Sprow*, the Fifth Circuit addressed the question as to which method a court applies in measuring distance under Rule 4 of the Federal Rules of Civil Procedure. Rule 4 states that service is effective to establish jurisdiction if the person is served "within 100 miles" from the courthouse where the summons issues. Rule 4 is silent as to the method to the measure distance and does not state "radius" or "road miles." The Court held that the "simplest and most proper method is the straight lines (sic) or 'as the crow flies' measure of air miles." *Sprow*, at 417. The Court also held that radius is a "uniform standard, offering more certainty than a measure based on road miles, which will continually fluctuate as new and different routes are constructed." *Id.*

As previously stated by Mr. Bellum, this matter involves a case of first impression nationally on the FMLA. Though no case can be found directly addressing the issue of "radius" versus "road miles" as the method to measure distance between work sites, it is important to note that more than twenty Courts around the United States consistently used "radius" as the measure of distance. *See Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1149-50 (10th Cir. Colo. 2004)(quoting House Report No. 102-135(I), at 37 (1991) "there is a geographic limitation of a 75-mile **radius** that applies to the aggregation of employees at different facilities."); *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253 (11th Cir. Fla. 2004) ("in order for statute [FMLA] to apply, the employer(s) at issue must have at least 50 employees within a 75 mile **radius** of the work site."); *Moreau v. Air France*, 343 F.3d 1179 (9th Cir. Cal. 2003); *Thomas v. Pearle Vision, Inc.*, 251 F.3d 1132 (7th Cir. Ill. 2001); *Nedzvekas v. LTV Copperweld*, 356 F.Supp. 2d (N.D. Ill. 2005); *Fauntleroy v. Rainbow Marketers*, 888 So.2d 1045 (La. App. 2004);

Nordquist v. City Finance Co., 173 F.Supp.2d 537 (N.D.Miss. 2001)(holding that plaintiff was not eligible for FMLA leave because there were less than 50 employees within a seventy-five mile **radius**); *Sylvester v. Dead River Co.*, 260 F.Supp.2d 181, 186 (D.Me. 2003)(stating in fn7 that the record does not contain number of employees within a seventy-five mile **radius** of work site)(citing §2611(2)(B)(ii)); *Paleologos v. Rehab Consultants, Inc.*, 990 F.Supp. 1460 (N.D.Ga. 1998) (holding that plaintiff must demonstrate that employer employed at least 50 employees within a 75-mile **radius**); *Rollins v. Wilson County Government*, 967 F.Supp. 990 (M.D.Tenn. 1997)(holding that an "eligible employee" must be employed at worksite with at least 50 employees within a 75-mile **radius**); *Figueira v. Black Entertainment Television, Inc.*, 944 F.Supp. 299 (S.D.N.Y. 1996)(holding that an "eligible employee" must work for employer with 50 employees within a 75-mile **radius**); *Rich v. Delta Air Lines, Inc.*, 921 F.Supp. 767 (N.D.Ga. 1996)(holding that an "eligible employee" must be employed at worksite with at least 50 employees within a 75-mile **radius**); *Cousin v. Sofono, Inc.*, 238 F.Supp.2d 357 (D.Mass. 2003); *Harbert v. Healthcare Services Group, Inc.*, 173 F.Supp.2d 1101 (D.Colo. 2001); *Gazda v. Pioneer Chlor Alkali Co., Inc.*, 10 F.Supp.2d 656 (S.D.Tex. 1997); *Harvell v. North Carolina Ass'n of Educators, Inc.*, 510 S.E.2d 403 (N.C.App. 1999); *Smith v. University of Chicago Hospitals*, 2003 WL 22757754 (N.D.Ill. 2003)(holding "the FMLA only applies to employers with fifty or more employees within a seventy-five mile **radius**."); *Dinkins v. Varsity Contractors, Inc.*, 2005 WL 599979 (N.D. Ill. 2005); *Knight v. Industrial Distribution Group, Inc.*, 2004 WL 2300477 (D. N.H. 2004); *Grimsley v. Fiesta Salons, Inc.*, 2003 WL 117985 (E.D.Mich. 2003) (holding "the Court finds that the defendant employed less than 50 employees within a 75-mile **radius** during the relevant time period, and the plaintiff was therefore not eligible to claim

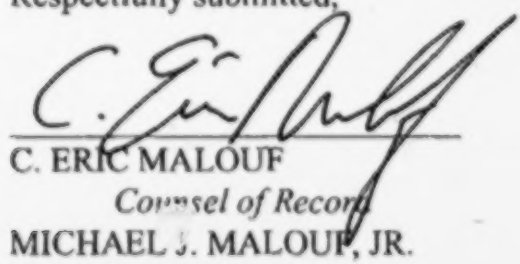
FMLA leave."); *Lincoln v. Sears, Roebuck and Co.*, 2002 WL 31108204 (D.Minn. 2002)(defendant argued that there were not 50 employees within a 75-mile **radius**); *Smallberger v. Federal Realty Investment Trust*, 1999 WL 126919 (E.D.Pa. 1999)(defendant argued that there were not 50 employees within a 75-mile **radius**); *Domnick v. Ver Halen, Inc.*, 2003 WL 23095738 (W.D.Wis. 2003); *Collinsworth v. Earthlink/Onemain, Inc.*, 2003 WL 22916461 (D.Kan. 2003); *Bliss v. Jennifer Convertibles, Inc.*, 2003 WL 22239655 (N.D.Ill. 2003); *Gonzalez-Wiley v. Tessa Complete Health Care, Inc., et al.*, 2002 WL 985564 (D.Or. 2002). Excluding the District Court and Fifth Circuit in the case at hand, not a single FMLA opinion has mentioned "surface" or "road" miles.

Furthermore, it is evident that the Secretary of Labor knew the correct measure of distance to be "radius" but acted on its own to reduce the coverage of the FMLA, contrary to the intent of Congress. In the preamble to the regulation in question, the Department of Labor acknowledged that its own regulations were written to include the term "radius" until it revised said regulations upon the request of a lobbyist group. 60 F.R. 2180, 2187 (1995).

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,



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Date: September 15, 2005

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60409

LARRY G. BELLUM,

Plaintiff-Appellant,

versus

PCE CONSTRUCTORS INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

Before GARWOOD, JONES and STEWART, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellant Larry G. Bellum appeals the decision of the district court granting summary judgment to defendant-appellee PCE Constructors, Inc. (PCE) on Bellum's federal claim under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 et seq., and on his pendent Mississippi law claims for both the intentional and negligent infliction of emotional distress. We affirm.

Facts and Proceedings Below

PCE is in the construction industry and does work

primarily on a project-by-project basis.[1] Its principal place of business is Baton Rouge, Louisiana, though it takes on projects across several southern states. During the time giving rise to the events in this case, PCE was building a facility for Fabricated Pipe, Inc (FPI) in Fernwood, Mississippi. PCE was also involved in helping FPI establish its pipe fabrication business.

PCE hired Bellum, who had worked for PCE on a contract-basis before, on December 12, 1999 to manage a particular project at the FPI site in Fernwood. PCE had a staff of 14 at its headquarters in Baton Rouge and 41 at the FPI site. Bellum testified in his deposition that he drove each day between his home in Baton Rouge and Fernwood, a round-trip of about 190 miles. The distance between PCE's headquarters and FPI is between 66.5 and 69.5 linear miles but 88.5 miles over public roadways.[2]

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[1] PCE argued in the district court that it is not a proper party under Rule 17 of the Federal Rules of Civil Procedure because it is not the successor to Constructors, Inc., which actually employed Bellum during the relevant period. The district court noted in its summary judgment order that it did not find it necessary to reach this issue in resolving the case in PCE's favor. In its brief before us, PCE noted that it was not going to address the proper party argument but asks us not to construe this as a waiver of the objection. Like the district court, we too are able to resolve the questions before us in PCE's favor, so the proper party issue is moot. Accordingly, for the purposes of appeal, we assume, *arguendo*, that PCE was Bellum's employer, and hence refer to it as such.

[2] In his memorandum in opposition to summary judgment, Bellum submitted several exhibits measuring the

On December 24, 2000, Bellum told his supervisor, Charles Gibson, that he was taking leave from work to have open-heart surgery. Bellum's last day was December 26, 2000. Bellum contends that while he was on leave for his heart surgery, Gibson repeatedly told both him and his wife that a job was waiting for him at the FPI site. Following his recovery from heart surgery, Bellum visited the FPI site on March 1, 2001 to investigate returning to work. Gibson apparently told him there was no longer any work for him because Bellum's project was completed in his absence. The two remained in touch over the next two weeks discussing work possibilities, but Bellum was formally terminated on March 16, 2001 without ever having returned to work.

On March 3, 2003, Bellum filed the instant suit in the district court seeking relief under the FMLA and for state law claims of emotional distress. On April 5, 2004, the district court granted summary judgment to PCE on the ground that Bellum was not an "eligible employee" under the FMLA. The district court also concluded that, absent a duty under the FMLA to rehire Bellum, PCE was free not to rehire him because Mississippi is an employment at-will state. It follows

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linear distance by various scientific methods. PCE stated that it calculated the distance over public roads using the popular website www.mapquest.com. In his brief on appeal, Bellum argues that the driving distance between PCE's headquarters and the FPI worksite is greater than 75 miles but less than 80. We presume that Bellum is measuring the shortest possible distance over public roads whereas PCE is measuring the distance using the interstate high ways. In any case, Bellum does not dispute that the shortest possible distance over the public roadways exceeds 75 miles.

from this, the district court reasoned, that Bellum could not succeed on his claim that he suffered actionable emotional distress when PCE chose not to rehire him. It is from this disposition that Bellum now appeals.

Discussion

A. Standard of Review

We review a grant of summary judgment under the same standard applied by the district court. *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 319 (5th Cir. 2003). We examine questions of law *de novo* and construe disputed material facts in favor of the non-movant. *Id.*

B. The FMLA

The FMLA provides, inter alia, an "eligible employee" with "a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition[.]" 29 U.S.C. § 2612(a)(1)(D). The parties do not dispute that Bellum's heart problems qualify as a "serious health condition." What they do dispute, however, is whether Bellum is an "eligible employee." PCE maintains that Bellum falls within one of two enumerated exceptions to the definition of eligible employee:

> "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by the employer within 75 miles of that worksite is less than 50."

29 U.S.C. § 2611(2)(B)(ii). This exception applies, PCE contends, because its headquarters, as measured over public

roads, is more than seventy-five miles from the FPI worksite.[3] Bellum counters that the exception does not apply because the linear distance, i.e. "as the crow flies," between FPI and the Baton Rouge headquarters is less than 70 miles.

The district court resolved this controversy by consulting 29 C.F.R. § 825.111(b), which states that the "75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed." The regulation goes on to provide that the 75-mile distance should only be measured as the crow flies when there is no "available surface transportation between worksites." *Id.*[4] The district court granted summary judgment to PCE because, under the method of measurement set forth in the regulation, Bellum was not an FMLA-eligible employee. Because the FMLA speaks simply of miles, not "surface miles," Bellum urges us to strike down 29 C.F.R. § 825.111(b) as manifestly contrary to the plain language of 29 U.S.C. § 2611(2)(B)(ii).

We review federal regulations of the sort at issue here under the familiar Chevron doctrine. If a statute is unambiguous, then the statute prevails over an inconsistent regulation. *Chevron U.S.A., Inc. v. Natural Resources Defense*

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[3] The parties do not dispute that PCE employed fewer than 50 employees at the FPI worksite but more than 50 at the FPI site and the Baton Rouge headquarters combined.

[4] 29 U.S.C. § 2654 provides that "The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I [29 U.S.C. §§ 2611-2619] of this chapter and this subchapter [29 U.S.C. §§ 2651-2654] . . .".

Council, Inc., 104 S. Ct. 2778, 2781 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") (citations omitted). To ascertain whether the statute has spoken unambiguously to the question at issue, we avail ourselves of the traditional means of statutory interpretation, which include, *see, e.g., Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1248-1249 (2004), the text itself, its history, and its purpose. While the 75-mile distance set forth in the statute is not inherently ambiguous, we disagree with Bellum that the failure of Congress to stipulate a method of measuring that distance implies that it should be measured as the crow flies. To measure in linear terms as Bellum suggests would regularly conduce to absurd results and no canon of statutory construction requires us to honor plain language when to do so would frustrate the unmistakable purpose of the law. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S. Ct. 1942, 1947 (2000) (stating that "when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd–is to enforce it according to its terms.") (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1030 (1989) (in turn quoting *Caminetti v. United States*, 37 S. Ct. 194 (1917)); *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1150-1151 (10th Cir. 2004) (stating, as one of its reasons for striking down an FLMA regulation, that no deference is owed to an interpretation of the statute that makes arbitrary distinctions).

The error in Bellum's approach may be illustrated as follows. Suppose that Company A had its headquarters along the south rim of the Grand Canyon and a branch office on the other side only 25 miles away as the crow flies. Suppose further, quite plausibly, that the shortest distance between the two by public roads is 120 miles. Now, imagine that Company

B has its headquarters next to a straight-line interstate highway and a branch office 80 miles away also right along the interstate. Under Bellum's reading of the statute, Company A would be bound by the FMLA but Company B would not be. Given that the purpose of the exception at 29 U.S.C. §2611(2)(B)(ii) is to relieve the burden of FMLA compliance on companies with widely dispersed operations, it would make no sense to construe the statute in a way that subjects Company A but exempts Company B. *See Moreau v. Air France*, 356 F.3d 942, 945 (9th Cir. 2004) (concluding that the purpose of the exception was "to accommodate employer concerns about 'the difficulties that an employer might have in reassigning workers to geographically separate facilities.'") (quoting H.R. Rep. No. 102-135, pt. 1, at 37 (1991))); 29 U.S.C. 2601(b) (1) & (3) ("It is the purpose of this Act to balance the demands of the workplace with the needs of families... in a manner that accommodates the legitimate interests of employers."); *see also Harbert*, 391 F.3d at 1150 (making use of a similar hypothetical to illustrate an arbitrary and capricious interpretation of the FMLA). We conclude, therefore, that the decision of Congress not to define a method of measuring the 75-mile distance constitutes an implicit statutory gap the Secretary of Labor is authorized to fill by 29 U.S.C. § 2654 (see note 4, *supra*).[5]

When Congress has left an implicit gap such as this one, the question before us is simply "whether the [regulation] is based on a permissible construction of the statute." *Chevron*, 104 S.Ct. at 2782. In answering this question, we consider only

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[5]In concluding that Congress was silent on the appropriate method of measuring the 75-mile distance, we also reject Bellum's argument that the Secretary of Labor was without authority to issue 29 C.F.R. § 825.111(b).

whether the regulation is arbitrary, capricious, or manifestly contrary to the FMLA. *Id.* We may not substitute our own preference for a reasonable alternative devised by the Secretary of Labor. *Id.* "The Secretary's judgment that a particular regulation fits within" the statutory framework of the FMLA "must be given considerable weight." *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1160 (2002). This is the essence of what is known as *Chevron* deference.

We hold that 29 C.F.R. § 825.111(b) is entitled to deference.[6] In our view, the regulation recognizes

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[6]Bellum's reliance on *Ragsdale* is misplaced. In *Ragsdale*, the Supreme Court struck down an FMLA regulation on the ground that it had no basis in the language of the FMLA and, moreover, was fundamentally inconsistent with the remedial nature of the statute. *See, e.g.*, the following from *Ragsdale*:

> "Our deference to the Secretary, however, has important limits: A regulation cannot stand if it is '"arbitrary, capricious, or manifestly contrary to the statute."' *United States v. O'Hagan, supra*, at 673, 117 S.Ct. 2199 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984))." (122 S.Ct. at 1160).
>
> . . .
>
> "We need not decide today whether this conclusion [of the regulation] accords with the text and structure of the FMLA, or whether Congress has instead 'spoken to the precise question' of notice, Chevron, supra, at 842,

that the FMLA is concerned with the practical issue of how an employer will be able to staff its business when an employee takes leave. Given that the overwhelming majority of workers in this country use surface transportation to get to work, the regulation implements the statutory scheme in a way that is consistent with the intent of Congress and germane to the challenges employers face in complying with the FMLA. The Secretary's approach has the additional advantage of avoiding

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> 104 S.Ct. 2778, and so foreclosed the notice regulations. Even assuming the additional notice requirement is valid, the categorical penalty the Secretary imposes for its breach is contrary to the Act's remedial design." (122 S.Ct. at 1161).

In this case, on the other hand, Congress was silent as to the method of measuring the 75-mile distance and the regulation promulgated by the Secretary of Labor advances, rather than impairs, the FMLA's remedial purpose. Nor is the regulation contrary to the design of the statute.

We also reject Bellum's contention that his method of linear measurement has been widely adopted by the federal courts. Bellum bases this assertion on the fact that numerous cases have used the word "radius," which by definition is a straight line from the center of a circle to anywhere along its edge, when discussing the 75-mile distance described by 29 U.S.C. §2611(2)(B) (ii). None of the twenty cases Bellum cites, however, concerned the question at issue here and it is evident that the courts were using the term "radius" in a colloquial, rather than technical, sense.

the sort of absurd result we hypothesized might prevail under Bellum's reading of the statute.[7]

C. Emotional Distress

Bellum also appeals the district court's grant of summary judgment on his pendent state claims for the intentional and negligent infliction of emotional distress.

Bellum's claim under Mississippi common law for the intentional infliction of emotional distress is subject to the one-year statute of limitations set forth at Miss. Code Ann. §15-1-35 (Rev. 1995). *King v. Otasco, Inc.*, 861 F.2d 438, 442 (5th Cir. 1988) (making an Erie "guess" that the intentional

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[7] Several weeks after oral argument and in response to a question put to counsel by the panel about how distances are measured for the purposes of service of process, Bellum brought to our attention *Sprow v. Hartford Ins. Co.*, 594 F.2d 412 (5th Cir. 1979). In *Sprow*, we concluded that measuring "as the crow flies" is the proper method for measuring the 100-mile distance for service of process under what was then FED. R. CIV. P. 4(f) and is now FED. R. CIV. P. 4(k)(1)(B). 594 F.2d at 417-418. In coming to this conclusion, we specifically rejected the use of road miles because that standard lacks uniformity and simplicity. *Id.* Even assuming arguendo that Rule 4(k)(1)(B) and 29 U.S.C. §2611(2)(B)(ii) are similar enough to warrant comparison, it is not necessary for us to address whether the considerations discussed in *Sprow* would lead to a better rule than the one devised by the Secretary of Labor because, in a *Chevron* case like this, the only question for us is whether the Secretary's construction of the statute is permissible, not the best. Having found that it is permissible, our inquiry is at an end.

infliction of emotional distress falls within the one-year statute of limitations for intentional acts; this "guess" adopted with respect to false arrest by *City of Mound Bayou v. Johnson*, 562 So. 2d 1212, 1218 (Miss. 1990)); *Hervey v. Metlife Gen. Ins. Corp. Agency Sys. of Miss., Inc.*, 154 F. Supp. 2d 909, 914-915 (S.D. Miss. 2001) (surveying relevant federal and state precedent in concluding that the one-year period still applies to the intentional infliction of emotional distress). His cause of action accrued no later than March 16, 2001 when he was terminated as part of a reduction in force at FPI. Bellum did not file his complaint until March 3, 2003, nearly two years later. His claim, therefore, is barred.

Relying on *McCorkle v. McCorkle*, 811 So.2d 258, 263-264 (Miss. App. 2001), Bellum contends that the running of the limitations period was tolled under Mississippi's continuing tort doctrine because the effects of his termination persist into the present. This is without merit and reflects a fundamental misunderstanding of the continuing tort doctrine. Under Mississippi law, acts that take place outside the one-year statute of limitations are actionable if, and only if, they are directly connected to an ongoing pattern of tortious conduct and at least one tortious act occurred within the one-year limitations period. *Id.* at 264. The continuing tort doctrine does not apply when a plaintiff like Bellum simply alleges that "harm reverberates from one wrongful act or omission." *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 149 (Miss. 1998).

We similarly find Bellum's claim for the negligent infliction of emotional distress to be without merit.

Employment in Mississippi is at-will. *Levens v. Campbell*, 733 So.2d 753, 760 (Miss. 1999). The only exceptions to this general rule are for breach of contract or

unlawful intentional acts such as terminating someone on account of his or her race. *Id.* (stating that "absent an employment contract expressly providing to the contrary, an employee may be discharged at the employer's will for good reason, bad reason, or no reason at all, excepting reasons only declared legally impermissible."). Bellum in effect is asking this panel to extend Mississippi common law by developing an exception to the at-will rule based on mere negligence. Furthermore, in every case in which the Mississippi Supreme Court has permitted a plaintiff to recover for the negligent infliction of emotional distress, the defendant has committed some independently wrongful act or breached some other duty imposed by law or by contract. For example, in *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290, 295 (Miss. 1992), the policyholder prevailed on her breach of contract claim but was not entitled to punitive damages because the insurer did not act intentionally in outright bad-faith. The court nevertheless allowed her to recover for her emotional damages on the theory that it was simply unfair, though not independently tortious, for the insurer to breach the contract but not be held liable for all of the reasonably foreseeable extra-contractual consequences of its conduct such as emotional harms. *See Southwest Miss. Reg'l Med. Ctr. v. Lawrence*, 684 So.2d 1257, 1269 (Miss. 1996) (allowing emotional damages in a successful breach of contract suit); *see also First Nat'l Bank v. Langley*, 314 So.2d 324, 329 (Miss. 1975) (permitting recovery for emotional distress without a physical impact for negligent breach of duty owed by bank to agent of its customer to receive and properly credit customer's funds placed by agent in bank's night depository and to exercise reasonable care in examining depository for missing deposit). Breach of some other duty imposed by law or contract, in other words, has always been shown where the Mississippi Supreme Court has allowed recovery for the mere negligent infliction of emotional distress. Bellum, however, has not established that PCE breached a contract, or breached any

duty imposed on it by law, or unlawfully discriminated against Bellum under the FMLA.[8]

This court will not use its diversity jurisdiction to "expand state law beyond its presently existing boundaries." *Rubinstein v. Collins*, 20 F.3d 160, 172 (5th Cir. 1994). That is solely the prerogative of the courts of Mississippi. *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 397 (5th Cir.) (en banc), cert. denied, 478 U.S. 1022 (1986).

Bellum, therefore, is not entitled to recover under the facts of this case for the negligent infliction of emotional distress.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[8] Indeed, Bellum has not shown that PCE treated him in any manner that can fairly be described as truly extreme and outrageous. On the contrary, the record indicates that Gibson, Bellum's former boss, stayed in touch with Bellum for a few weeks after Bellum was physically able to return to work but there was no work for him at PCE.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-60409

LARRY G. BELLUM,

Plaintiff-Appellant

versus

PCE CONSTRUCTORS INC

Defendant-Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING EN BANC

(Opinion 4/25/05, 5 Cir., _____, _____ F.3d _____)

Before GARWOOD, JONES and STEWART, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

signed by Will Garwood
United States Circuit Judge

REHG-6a

2 Supreme Court, U.S.
FILED
05-640 SEP 15 2005
No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LARRY G. BELLUM,
Petitioner,

v.

PCE CONSTRUCTORS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LARRY G. BELLUM

PLAINTIFF

VS. **CIVIL ACTION NO. 3:03-CV-343BN**

PCE CONSTRUCTORS, INC.

DEFENDANT

OPINION AND ORDER

This cause is before the Court on the following Motions:

1) the Motion for Summary Judgment of Defendant PCE Constructors, Inc. (hereinafter "Constructors"); and

2) the Motion to Strike Plaintiff's Amended Memorandum in Opposition to Motion for Summary Judgment.

Having considered the Motion for Summary Judgment, the Response, the Rebuttal and all attachments to each, as well as supporting and opposing authority, the Court finds that it is well taken and should be granted. In reaching the conclusions regarding the Motion for Summary Judgment, the additional arguments stated in Plaintiff's Amended Memorandum in Opposition to Motion for Summary Judgment were inconsequential. Accordingly, the Motion to Strike should be denied as moot.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This cause of action was brought by Plaintiff against his former employer under the Family Medical Leave Act, 29 U.S.C. § 2601 et seq. (hereinafter "FMLA") and under Mississippi tort law. Plaintiff Bellum was employed by Constructors or a Constructors related entity beginning on or about April 27, 1997.[1] During his employment tenure with Constructors, he worked in different towns. At all times relevant to this suit, however, Plaintiff worked at a facility located in Fernwood, Mississippi.

On December 27, 2000, Plaintiff took medical leave from his job with Constructors to undergo heart surgery. On March 1, 2001, Plaintiff was released to return to work. Upon returning to Constructors in expectation of resuming his position of employment, Plaintiff was informed that his job had been

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[1]Defendant contends that Constructors, Inc., which is not a named Defendant, was actually Plaintiff's employer, rather than the named Defendant PCE Constructors, Inc. Accordingly, one of Defendant's arguments is that summary judgment must be granted pursuant to Rule 17 of the Federal Rules of Civil Procedure because PCE Constructors, Inc. is not a real party in interest. The Court need not address this argument because summary judgment is granted on other grounds. The Court makes mention of this issue to clarify that its reference to "Constructors" herewith should not be interpreted as an indication that Defendant's real party in interest argument has been rejected. The Court simply need not address that particular issue.

terminated. The official date of Plaintiff's employment termination was March 16, 2001.

Contending that he was entitled to return to his position or a comparable employment position, Plaintiff filed the subject suit under the FMLA on March 3, 2003. The Complaint also includes a claim of infliction of emotional distress under Mississippi state law. The subject Motion for Summary Judgment was filed by Constructors on February 17, 2004. The Motion is now ripe for consideration by the Court.

II. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof of trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The movant need not,

however, support the motion with materials that negate the opponent's claim. Id. As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non-moving party's claim. Id. at 323-24. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id. at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. It is improper for the district court to "resolve factual disputes by weighing conflicting evidence, . . . since it is the province of the jury to assess the probative value of the evidence." Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is also improper where the court merely believes it unlikely that the non-moving party will prevail at trial. National Screen Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962).

III. SUMMARY JUDGMENT ANALYSIS

A. FMLA Claim

Constructors asserts several arguments regarding dismissal of Plaintiff's FMLA claim, any one of which, if found to be with merit, would require summary dismissal of the claim. The Court finds herewith that the FMLA claim must be dismissed because Plaintiff falls outside of the definition of an "eligible employee" under FMLA. Therefore, the Court need not consider the remainder of Defendant's summary judgment arguments.

To seek redress under the FMLA, an aggrieved party must fall under the definition of an "eligible employee."

"Eligible employee" is defined in part under 29 U.S.C. § 2611 (2) (A), which states:

> (2) Eligible employee
> (A) In general
> The term "eligible employee" means an employee who has been employed-
> (I) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and
> (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

The parties agree that Plaintiff meets the requirement of § 2611 (2) (A). However, Constructors contends that under the provisions of § 2611 (2) (B) (ii), Plaintiff is specifically *excluded* from the definition of an "eligible employee." The Court agrees.

> Under § 2611 (2) (B) (ii):
>
> The term "eligible employee" does not include-
> * * * * *
> (ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

In summary, an otherwise "eligible employee" is rendered ineligible if the subject employer employed less than 50 people within 75 miles of the worksite at which the aggrieved employee worked. In issue in this case is whether the 75 mile distance stated in § 2611 (2) (B) (ii) is measured "as the bird flies," as Plaintiff asserts, or "as the road lies," as Constructors asserts.

Plaintiff worked at the Fernwood, Mississippi worksite of Constructors. The Fernwood worksite employed significantly less than 50 people. The parties agree that the closest facility to Fernwood, Mississippi at which Constructors had an employee base was in Baton Rouge, Louisiana.[2] The aggregate number of employees at the Fernwood and Baton Rouge worksites exceeded 50 employees. If the distance from Fernwood to Baton Rouge is measured by road miles, the two facilities are approximately 88.53 miles apart. Memorandum of Law in Support of Defendant's Motion for Summary Judgment, p. 11 n. 4. If the distance between the two cities is measured in a straight line, the two worksites are approximately 65.9 miles apart. Response to Motion for Summary Judgment, Exhibits "I" through "L." Based on these facts, the viability of Plaintiff's FMLA claim hinges upon which of the two methods of measurement the Court must utilize.

The subject issue is squarely addressed in 29 C.F.R. § 825.111 (b), which states:

> *The 75-mile distance is measured by surface miles, using surface transportation over public streets,* roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (e.g., airline miles).

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[2]The parties do not contest the fact that the Baton Rouge facility is the only facility at which Constructors had employees, which was arguably within 75 miles of Fernwood.

(Emphasis added). Based on the clear and unequivocal language of 29 C.F.R. § 825.111 (b), this Court must adopt the measurement calculation proposed by Constructors; i.e., the distance between Fernwood and Baton Rouge as measured by road miles. That distance is greater than 75 miles. The Court therefore finds that Plaintiff is excluded from the definition of a "covered employee" under the provisions of 29 U.S.C. § 2611 (2) (B) (ii). Accordingly, Plaintiff's claim under the FMLA must be dismissed.

B. Infliction of Emotional Distress Claim

In the absence of a viable FMLA claim, Plaintiff's infliction of emotional distress claim must be dismissed as well. Plaintiff contends that he suffered emotional distress a result of the failure by Constructors to reinstate him to his employment position after returning from medical leave. Assuming *arguendo* that Plaintiff did in fact suffer emotional distress, the claim is nevertheless non-cognizable if Constructors had the right to refrain from re-hiring Plaintiff. As indicated by the following binding Mississippi law, Constructors did operate within the bounds of its legal rights in choosing not to re-hire Plaintiff.

Mississippi is an "at will" employment state. Levens v. Campbell, 733 So.2d 753, 760 (Miss. 1999). "[A]bsent an employment contract expressly providing to the contrary, an employee may be discharged at the employer's will for good reason, bad reason, or no reason at all. . . ." Id. (citations omitted). Therefore, if Plaintiff had no contractual right to ongoing employment, or if no law, such as the FMLA, required Constructors to reinstate Plaintiff, then Constructors was not obligated to re-hire Plaintiff. Plaintiff has come forward with no binding contract of employment between him and Constructors. Also, as analyzed above, Constructors was not required to

reinstate Plaintiff under the FMLA. The Court therefore finds that Constructors was not required to re-hire Plaintiff after he returned from medical leave. In that context, Plaintiff has failed to state a viable infliction of emotional distress claim based on the legally permissible decision by Constructors to refrain from reinstating him.

The Court further notes that under Mississippi law, "a cause of action for intentional infliction of emotional distress in a workplace environment has usually been limited to cases involving a pattern of deliberate, repeated harassment over a period of time." Lee v. Golden Triangle Planning & Dev. Dist., Inc., 797 So.2d 845, 851 (Miss. 2001) (citation omitted). Such a claim "will not ordinarily lie for mere employment disputes." Id. (citation omitted). The Court finds that the holdings in Lee provide an additional reason for dismissing the infliction of emotional distress claim. That is, Plaintiff cannot maintain an emotional distress claim based on the mere fact that his employment position was terminated. Under the facts of this case, Plaintiff's employment termination does not represent "deliberate, repeated harassment over a period of time." Summary Judgment on this issue must be granted.

IV. CONCLUSION

Based on the reasons set forth in this Opinion, Summary Judgment is granted herewith. In reaching this conclusion, the additional arguments presented in Plaintiff's Amended Memorandum in Opposition to Motion for Summary Judgment were of no consequence. Accordingly, the Motion to Strike Plaintiff's Amended Memorandum in Opposition to Motion for Summary Judgment should be denied as moot.

IT IS THEREFORE ORDERED that the Motion of Defendant for Summary Judgment [36-1] is hereby granted. A

Final Judgment dismissing this case with prejudice will be entered on this day,

IT IS FURTHER ORDERED that the Motion to Strike Plaintiff's Amended Memorandum in Opposition to Motion for Summary Judgment [47-1] is hereby denied as moot

SO ORDERED this the [5th] day of April, 2004.

/s/ William Barbour
UNITED STATES DISTRICT JUDGE

tct

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LARRY G. BELLUM **PLAINTIFF**

VS. **CIVIL ACTION NO. 3:03-CV-343BN**

PCE CONSTRUCTORS, INC. **DEFENDANT**

FINAL JUDGMENT

In accordance with the Opinion and Order entered on this day granting Defendant's Motion for Summary Judgment, this case is hereby finally dismissed with prejudice.

SO ORDERED this the [5th] day of April, 2004.

/s/ William Barbour
UNITED STATES DISTRICT JUDGE

tct